Hearing:
March 4, 2003

Mailed:
May 7, 2003

Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Food Processing Equipment Co.

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Serial No. 75/909,661
Serial No. 75/909,662
Serial No. 75/909,664
Serial No. 75/909,666
Serial No. 75/909,667
Serial No. 75/909,668
Serial No. 75/917,250

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Ronald P. Kananen of Rader, Fishman & Grauer, PLLC for Food Processing Equipment Co.

Mary Boagni, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Cissel, Seeherman and Bottorff, Administrative Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant has appealed the Trademark Examining Attorney's final refusals of registration in the seven

above-captioned applications. Because each of the appeals involves the same refusals and common issues of law and fact, the appeals have been consolidated. A single oral hearing was held, and we shall decide all of the appeals in this single opinion.

Applicant's seven applications (all of which are based on intent-to-use) are summarized as follows:

- Serial No. 75/909,661, for registration of the mark MEGA TUMBLER (in typed form, TUMBLER disclaimed) for "food processing machines, namely machines for tumbling meat and chicken products during manufacturing in order to blend, cure, treat, massage, chill, freeze and/or process the meat and chicken parts," in Class 7;

- Serial No. 75/909,662, for registration of the mark MEGA SYSTEMS (in typed form, SYSTEMS disclaimed) for "food processing machines, namely machines for blending meat and chicken food products; machines for processing meat, poultry and pet food; and machines for blending, mixing, massaging and handling meat, poultry and pet food," in Class 7, and "food processing machines, namely machines for chilling and freezing meat, poultry and pet food; chilling and freezing machines used in food processing which mix,

blend, and massage meat, poultry, and pet food," in Class 11;[1]

- Serial No. 75/909,664, for registration of the mark MEGA LIFT (in typed form, LIFT disclaimed) for "food processing machines, namely power operated lifts for moving food products, namely meat, poultry and pet food, during manufacturing," in Class 7;

- Serial No. 75/909,666, for registration of the mark MEGA METERING SYSTEM (in typed form, METERING SYSTEM disclaimed) for "food processing machines, namely machines for conveying food products, namely, meat, poultry and dog food during processing," in Class 7, and "food processing machines, namely machines for measuring and weighing food products, namely meat, poultry and dog food during processing; food processing machines, namely a measuring and weighing machine for meat, poultry and dog food which features a conveyor," in Class 9;[2]

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[1] This amended identification of goods was suggested/required by the Trademark Examining Attorney in her final Office action. Applicant adopted the amended identification of goods in its appeal brief, and the amendment was accepted by the Trademark Examining Attorney during the oral hearing. The Board has entered the amendment, and applicant's attorney's deposit account shall be charged the application filing fee for the additional class.

[2] This amended identification of goods was suggested/required by the Trademark Examining Attorney in her final Office action. At the oral hearing, applicant agreed to adopt the amendment and the Trademark Examining Attorney indicated that she would accept the

- Serial No. 75/909,667, for registration of the mark MEGA MEAT PRESS (in typed form, MEAT PRESS disclaimed) for "food processing machines, namely machines for pressing meat and poultry, during manufacture," in Class 7;

- Serial No. 75/909,668, for registration of the mark MEGA DUMPER (in typed form, DUMPER disclaimed) for "food processing machines, namely pivotable machines for transporting, loading, and unloading meat and chicken products to or from other food processing machines during manufacturing in order to blend, cure, treat, massage, chill, freeze and/or process the meat and chicken products," in Class 7; and

- Serial No. 75/917,250, for registration of the mark MEGACOOKER (in typed form) for "food processing machines, namely machines for cooking meat, poultry and pet food," in Class 7.

In each of the seven applications, the Trademark Examining Attorney has issued two refusals to register under Trademark Act Section 2(d), 15 U.S.C. §1052(d). The Section 2(d) refusals in each of the applications are based on the following two registrations (which are owned by

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amendment. After oral hearing, applicant filed a paper requesting entry of the amendment. The Board has entered the amendment, and applicant's attorney's deposit account shall be charged the application filing fee for the additional class.

different registrants): Registration No. 2,150,050, of the mark MEGGA (in typed form) for "machine for loading eggs into egg trays in the nature of flats and into cartons," in Class 7;[3] and Registration No. 2,245,284, of the mark MEGA SERIES (in typed form, with a disclaimer of SERIES) for "food machinery for commercial manufacture of corn products, pizzas, tortillas and tortilla chips," in Class 7.[4]

After careful consideration of the evidence of record and the arguments of counsel, and for the reasons discussed below, we affirm the Section 2(d) refusal in each of the seven applications as to Registration No. 2,245,284 (the MEGA SERIES mark), but we reverse the Section 2(d) refusal in each of the seven applications as to Registration No. 2,150,050 (the MEGGA mark).

We turn first to the Section 2(d) refusals based on the previously-registered MEGA SERIES mark for "food machinery for commercial manufacture of corn products, pizzas, tortillas and tortilla chips." Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

[3] Issued on April 14, 1998, pursuant to Trademark Act Section 44, 15 U.S.C. §1126.

[4] Issued on May 18, 1999.

relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

As to each of applicant's applications, we must determine whether applicant's mark and the cited registered mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered

in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.,* 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Initially, we find that the word MEGA is the dominant feature in registrant's MEGA SERIES mark and in each of applicant's seven marks, i.e., MEGA TUMBLER, MEGA SYSTEMS, MEGA LIFT, MEGA METERING SYSTEM, MEGA MEAT PRESS, MEGA DUMPER and MEGACOOKER. MEGA, although perhaps slightly laudatory, nonetheless is a suggestive and therefore inherently distinctive term as applied to the goods at issue here. The other wording in each of these marks is descriptive or generic matter which would have little or no source-indicating significance to purchasers, and it therefore is entitled to less weight in our comparison of the marks' respective commercial impressions.

For example, purchasers are likely to view the term MEAT PRESS in applicant's MEGA MEAT PRESS mark not as a source indicator but merely as an indication that the goods sold under the mark are meat presses. The same is true for the generic words LIFT, METERING SYSTEM, TUMBLER, DUMPER and COOKER in applicant's other marks; in each case, these

words function more as a means of indicating the nature of the goods themselves than as a means by which purchasers would identify and distinguish the source of the goods. Purchasers will look primarily, if not exclusively, to the term MEGA in each of these marks in order to identify and distinguish the source of these goods.

Similarly, the word SYSTEMS in applicant's MEGA SYSTEMS mark, and the word SERIES in the cited MEGA SERIES mark, have less source-indicating significance than does the word MEGA in each mark. The word SYSTEMS in applicant's MEGA SYSTEMS mark primarily informs purchasers that applicant's food processing machinery sold under the mark functions as, or as part of, a system. Purchasers will look to and rely on the word MEGA in their efforts to ascertain the source of the goods comprising that system. Likewise, the word SERIES in the cited MEGA SERIES mark primarily informs purchasers that the food processing machinery sold under the mark comprises, or is part of, a series of such goods, and they will look to and rely on the term MEGA to ascertain the source of such series of goods.

Thus, we find that the word MEGA is the dominant feature in each of the marks at issue here. Although we do not disregard the other, disclaimed matter in each of the marks, for the reasons discussed above we find that such

matter is entitled to relatively less weight in our comparison of applicant's marks and the cited registered mark. *See In re National Data Corp., supra*.

Comparing applicant's marks to the cited registered mark in terms of appearance, sound, and meaning, we find that applicant's marks are identical to the cited registered mark to the extent that MEGA appears in the marks. The marks as a whole are not identical due to the differences in the descriptive or generic wording comprising the remainders of each mark, but we find that they nonetheless are more similar than dissimilar when compared in their entireties. The similarity between the marks which results from the presence and dominance in each mark of the term MEGA outweighs any dissimilarities between the marks which result from the different descriptive or generic matter in each mark.

Purchasers encountering these marks on similar or related goods are likely to assume that MEGA TUMBLER, MEGA SYSTEMS, MEGA LIFT, MEGA METERING SYSTEM, MEGA MEAT PRESS, MEGA DUMPER and MEGACOOKER are all members of a MEGA SERIES family of marks owned and used by a single source. Similarly and alternatively, applicant contends in its appeal briefs in each of the applications that it "uses a plurality of MEGA-formed compound marks as part of its MEGA

SYSTEMS marks." Thus, applicant anticipates that its various marks would be perceived by purchasers as a family of MEGA-formative marks for food processing machines; we find that purchasers likewise would assume that the MEGA SERIES mark, if used on similar or related goods, is part of that same family of marks.

In summary, we find that each of applicant's marks is similar rather than dissimilar to the cited registered mark MEGA SERIES. This similarity of the marks weighs in favor of a finding of likelihood of confusion.

We turn next to a comparison of applicant's and registrant's goods. It is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984)*; In re Melville Corp.,* 18 USPQ2d

1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

Applying these principles in the present case, we find that the goods identified in applicant's applications and the goods identified in the cited registration are sufficiently related that source confusion is likely to result from use thereon of the confusingly similar marks involved here. Applicant's food processing machinery is used in connection with processing meat, poultry and pet food, while registrant's machinery is used in connection with processing corn products, including snack foods like tortilla chips. Despite these differences in function and application, however, applicant's and registrant's respective types of food processing machinery are related, for purposes of our likelihood of confusion analysis, because the record shows that they are types of machinery that may be manufactured and sold by a single source under a single mark.

For example, the record shows that an apparent competitor of applicant's, Urschel Laboratories, manufactures and sells food processing machinery for a variety of food manufacturing applications, including "meat, poultry and fish" and "pet food" applications like

those to which applicant's machinery is directed, as well as "snack food" applications like those to which registrant's machinery is directed (e.g., tortilla chips). Similarly, another manufacturer, Mech-Food, manufactures food processing machinery for a variety of applications, specifically including "snack food and confectionery machinery" and "meat and poultry processing machinery."[5] More generally, the third-party registration evidence made of record by the Trademark Examining Attorney suggests, contrary to applicant's contention, that manufacturers of food processing machinery do not limit themselves to manufacture of machinery for a single application or type of food. Rather, there are manufacturers who, like applicant, manufacture and sell machinery for processing meat products, yet also sell, under the same mark, food processing machinery used in manufacturing other types of foods as well.[6]

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[5] See the Web page advertisements of Urschel Laboratories and Mech-Food, attached to the Trademark Examining Attorney's final Office actions in several of the applications.

[6] See, e.g., Registration Nos. 2,104,918, 1,949,955, 1,519,535, 2,508,137, 2,496,619, 765,025, 2,025,285, 2,039,679, 1,171,948 and 396,846, all of which are included among the third-party registrations attached to the Trademark Examining Attorney's final Office actions in the various applications. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods or services identified therein are of a

Given this industry practice, it is not dispositive that applicant itself might not manufacture or sell registrant's type of machinery, or that registrant itself might not manufacture or sell applicant's type of machinery. Purchasers aware of the fact that these respective types of machinery can originate from a single source under a single mark are likely to assume, upon encountering applicant's and registrant's machinery bearing the confusingly similar marks at issue here, that such machinery originates from a single source.

Based on the evidence discussed above, we find that the goods identified in applicant's respective applications are similar and related to the goods identified in the cited registration. This similarity and relatedness of the goods weighs in favor of a finding of likelihood of confusion.

We also find that applicant's and registrant's respective types of goods are marketed in the same trade channels and to the same classes of purchasers. The Web page advertisements from Urschel Laboratories and Mech-Food, discussed above, show that both types of machinery

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type which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

are marketed together. It stands to reason that any large food manufacturing concern, to the extent that it manufactures both meat and poultry food products as well as food products derived from corn, would be a potential purchaser of both applicant's and registrant's types of food processing machinery. At the oral hearing in this case, applicant's counsel conceded that Tyson Foods, apparently a major purchaser of applicant's meat and poultry processing machinery, is likely also to be a purchaser of corn product processing machinery like registrant's. This similarity of trade channels and classes of purchasers weighs in favor of a finding of likelihood of confusion.

Applicant contends, however, that the food processing machinery involved in this case is expensive and purchased with care by sophisticated purchasers. Even assuming that this is so (and the record is silent on this point), we find that although such purchaser care and sophistication would weigh in applicant's favor, it does not weigh so heavily as to overcome the other *du Pont* factors which support a finding of likelihood of confusion. We cannot conclude on this record that purchasers would be immune to source confusion resulting from the relatedness of the

respective goods and the strong similarity of the marks.

Applicant also contends that there have been no instances of actual confusion between applicant's marks and registrant's mark despite two years' contemporaneous use.[7] However, we find that the probative value of this apparent absence of actual confusion is negated by the absence of evidence from which we can conclude that a substantial opportunity for actual confusion has presented itself in the marketplace. There is no evidence as to the scope or extent of applicant's or registrant's use of the respective marks, as to applicant's or registrant's respective market shares, or as to whether applicant and registrant actually sell in the same geographic areas. On this record, we cannot conclude that an absence of actual confusion is either factually surprising or legally significant. *See Gillette Canada Inc. v. Ranir Corp.,* 23 USPQ2d 1768 (TTAB 1992). We therefore accord the apparent absence of actual confusion only slight weight in applicant's favor in our

[7] In some of the applications, applicant argues that there has been four years' contemporaneous use without actual confusion. We note that, as originally filed, each of the seven applications was based both on a claim of use in commerce (with a particular date of first use alleged) and on a claim of bona fide intent to use. In its response to the first Office action in each of the applications, applicant requested that the claim of use be deleted and that the application proceed on the basis of intent-to-use.

likelihood of confusion analysis.

Having carefully considered all of the evidence of record as it pertains to the *du Pont* evidentiary factors, we conclude that each of applicant's marks, as applied to the goods identified in the respective applications, so resembles the previously-registered mark MEGA SERIES as to be likely to cause confusion, to cause mistake, or to deceive. We have carefully considered applicant's arguments to the contrary, including any arguments not specifically discussed in this opinion, but we are not persuaded of a different result. Any doubts as to the correctness of our decision must be resolved against applicant. *See In re Hyper Shoppes (Ohio) Inc.,* 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc*., *supra*.

However, we reverse the Trademark Examining Attorney's other Section 2(d) refusal, in each of the applications, based on the previously-registered mark MEGGA for "machine for loading eggs into egg trays in the nature of flats and into cartons." We find that the evidence of record is insufficient to establish the requisite relationship between the egg handling machinery identified in this registration and any of the goods identified in applicant's

applications.[8] More importantly, we find that the registered mark MEGGA is too dissimilar to applicant's marks to support a finding of likelihood of confusion. MEGGA is phonetically identical to the MEGA portion of each of applicant's marks, but the marks are sufficiently dissimilar in connotation and overall commercial impression that no confusion is likely. The embedded "EGG" in the registered mark gives that mark a somewhat unique and whimsical commercial impression, as applied to the registrant's goods, which suffices to distinguish the registered mark from any of applicant's marks.

Decision: In each of the seven above-captioned applications, the Section 2(d) refusal based on Registration No. 2,150,050 (the MEGGA mark) is reversed, but the Section 2(d) refusal based on Registration No. 2,245,284 (the MEGA SERIES mark) is affirmed.

[8] The only evidence in the record that mentions egg handling machinery at all is a single third-party registration.